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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 26 2010

SRC 07 232 51235

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Marie Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences. At the time he filed the petition, the petitioner was a human factors specialist at [redacted] Charlotte, North Carolina. The petitioner later took a position as a principal engineer at Westinghouse Electrical Company. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel, documentation of his most recent activities, and information regarding citation of his published work.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The petitioner claims eligibility for classification as an alien of exceptional ability in the sciences. The record readily establishes that the petitioner, whose occupation requires at least a bachelor's degree and who holds a doctoral degree, qualifies as a member of the professions holding an advanced degree. A determination regarding the petitioner's claim of exceptional ability would be moot; it would occupy significant space in this decision, without affecting the ultimate outcome thereof.

The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on July 27, 2007. In a statement accompanying the initial filing, the petitioner described his work (referring to himself in the third person) and explained why he believes he qualifies for the national interest waiver:

> A veteran in the research of Human Factors Engineering / Cognitive Ergonomics, Human-Automation Interaction and Industrial Automation, [the petitioner's] contribution has been recognized nationally and internationally as exceptional and having achieved significant[ly] higher levels than people of similar qualifications. Currently, his research is focused on the study of situation awareness in complex systems (e.g., nuclear power plant process control, driving and vehicle control), human-automation interaction and associated interface design, etc.
>
> . . . [The petitioner's current work involves] research and development of human factors engineering in nuclear power plant control room design [at] [redacted] The primary objective of the research is to define situation awareness in nuclear power plant process control and improve human-automation interaction and associated interface design. . . . This work is critical because it ensure[s] there is no or minimum human error during the nuclear power plant operations. The TMI (Three Mile Island) accident and the Chernobyl disaster resulted from a poor control room design with no human factors engineering (or human-centered design) involved. . . . [The petitioner] is one of the leading researchers in the area.

The petitioner stated that his doctoral research at North Carolina State University (NCSU) involved studying the effects of distractions on automobile drivers, "research on the human performance and workload in human-robot interaction," and "investigat[ing] the effects of physical workload (standing, walking and jogging on a treadmill) on cognitive task performance and situation awareness." The petitioner stated that he "has been able to successfully transition his knowledge of situation awareness in complex systems from the driving domain to nuclear power systems."

According to his initial statement, the petitioner had published three articles as of the filing date, with two more in press. He listed four citations of one 2005 article. Three of those four citations were self-citations by the petitioner and his co-author, [redacted] Thus, the petitioner's initial submission identified one independent citation of his work. Furthermore, all of the petitioner's identified articles arose from his graduate student work with automobile control. He claimed no publication record relating to his more recent work with nuclear power plant control rooms.

Seven witness letters accompanied the initial filing. [redacted] who supervised the petitioner's graduate studies, stated:

> [The petitioner] is an excellent researcher with a strong analytical skill set. His work has focused on situational awareness in complex systems control and human-automaton interaction in vehicle systems and nuclear power plant design. While at NC State, [the petitioner] studied the perception of presence in virtual reality, virtual task workload and

performance. . . . This work demonstrated [the petitioner's] strong propensity to conduct research. [The petitioner's] dissertation focused on defining the concept of situation awareness in the context of driving and quantifying the impact of cellular phone use and in-vehicle navigation devices on driver perception, comprehension and projection of roadway environments. He developed a new model of driver situation (roadway) awareness for operational, tactical and strategic behaviors and demonstrated how secondary distracter tasks, like talking on a mobile phone, mediate the achievement and maintenance of "good" roadway awareness. . . . This work demonstrated [the petitioner's] excellence in research and laid the foundation for his reputation in the field of human factors engineering.

[redacted] of Brunel University, Uxbridge, United Kingdom, stated:

I first came to know [the petitioner] from his publication in the *International Journal of Industrial Ergonomics* on 2005 [*sic*]. My co-author and I actually cited his work co-authored with [redacted] in one of my publications. I also know [redacted], [the petitioner's] former advisor. I've get [*sic*] more and more familiar with [the petitioner] since he submitted a manuscript to a special issue of Ergonomics on Driver Safety in *Ergonomics*. I was the Editor-in-Chief for the special issue. I also invited him as a referee to review one of the submittals to the special issue in *Ergonomics*. . . .

[The petitioner's] primary area of scientific investigation is situation awareness in driving, human-automaton interaction and its applications. . . . He has quantified the measure of situation awareness in the domain of driving and developed a new model of driver situation awareness for operational, tactical and strategic driving behaviors. This model is very important because it could be used to predict driver cognition and driving performance when a new in-vehicle technology is introduced. . . . [The petitioner] is now continuing and transferring his situation awareness in complex systems research into nuclear power plant control rooms. . . . [The petitioner] is one of the leading individuals in his area of expertise, without whom there would be a significant vacuum in this area of scientific research.

Regarding the claim that the petitioner "is one of the leading individuals in his area of expertise," [redacted] letter seems to indicate that the petitioner's expertise lies in driver awareness, rather than in nuclear power plant design (a specialty to which the petitioner is still "transferring his . . . research").

[redacted] of the University of Tsukuba, Japan, who met the petitioner at a 2005 conference, stated:

[The petitioner] developed a new model of driver situation awareness for operational, tactical and strategic driving behaviors under normal driving conditions. This model has the potential to be a basis for predicting the impact of new in-vehicle technologies on driver situation awareness and errors in driver performance.

[redacted] acknowledged the petitioner's work for AREVA NP, but stated that the petitioner's "future work would include expanding the model of situation awareness in driving and to predict driver performance under normal and hazard conditions."

Another witness who met the petitioner at a professional conference, [redacted] of Northeastern University, Boston, Massachusetts, also used similar language to describe the petitioner's work: "He conducted rigorous experiment studies on situation awareness in driving while introducing in-vehicle automation and multitasking. He further developed a new model of driver simulation awareness for operational, tactical and strategic driving behaviors. All of his efforts are transferring to his current work."

[redacted] of the University of Western Ontario, Canada, also met the petitioner at a professional conference. [redacted] stated: "With his strong background in industrial automation and research experience in human factors engineering, his diligence and intelligence, [the petitioner] is superior in performing this human factors engineering research in nuclear power plants."

University of Oklahoma Assistant [redacted] who studied alongside the petitioner at North Carolina A&T University in 2001, stated that the petitioner's "research is critical to driving safety.'

[redacted] at Idaho National Laboratory, "interviewed [the petitioner] for a Human Factors researcher position" and "was impressed by his excellent training in automation, control engineering, and human factors engineering," but the petitioner's immigration status prevented full consideration of the petitioner's application.

The letters discussed above indicate that the witnesses hold high opinions of the petitioner's skills as a researcher, but they do not establish the extent of the petitioner's influence on his field. The letters contain little discussion of the petitioner's intended work with nuclear power plants, apart from the oft-repeated assertion that the beneficiary's prior work with driver attention relates to other endeavors.

The petitioner submitted other exhibits as well, such as documentation of his conference presentations and memberships in associations. The significance of these exhibits is not self-evident, and the record does not objectively show that these materials show anything other than that the petitioner is a properly qualified researcher in his field.

On December 31, 2008, the director issued a request for evidence, instructing the petitioner to provide more documentary evidence of the impact and importance of his work. In response, the petitioner submitted a printout from http://scholar.google.com, showing 21 citations of the petitioner's published work. His 2005 article had earned 14 citations, with one or two citations each for five other papers.

The petitioner submitted partial copies articles and student papers citing to his work. An accompanying exhibit list indicated that the petitioner had submitted "13 papers," but the submission contains two duplicates, representing only eleven unique papers and articles. One paper was co-authored by [redacted]

[redacted] and two others were written by [redacted] students, leaving eight citations outside of [redacted]'s research group. The citations relate to the petitioner's work on driver attention, rather than his later work with nuclear power plants.

The petitioner also submitted what were described as "media reports on [the petitioner's] work," most of which simply repeat, verbatim, a NCSU press release from 2005. At least one of the "media reports" appears to be a "blog" post that quotes at length from the press release.

The petitioner also submitted three new witness letters. Unlike the initial witnesses, the new witnesses concentrated on the petitioner's work relating to nuclear power plants. [redacted] owner of a "consulting company that focuses on probabilistic risk analysis and human reliability analysis in nuclear power plants," stated that the petitioner "is a leading and foremost expert in the research and design of applying human factors in the compact and advanced control room for the third generation of nuclear power plants." [redacted] described the petitioner's papers and presentations in that specialty, most of which appeared after the petition's filing date.

[redacted] of the University of Toronto, who met the petitioner at a 2006 conference, stated that the petitioner's "research findings have important safety implications for crew performance in 3rd generation nuclear power plants."

The above two witnesses did not specify to what extent, if any, the petitioner's work has been implemented at nuclear power plants in the United States or elsewhere, nor did they identify any plants that have concrete plans to implement the petitioner's work in the future. [redacted] Factors Specialist at the Institute for Energy Technology's OECD Halden Reactor Project, Norway, provided more information about the implementation of the petitioner's work. The work he described, however, took place after the petitioner had moved from AREVA NP to Westinghouse Electric Company, sometime after the petition's filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

The petitioner showed that he won an in-house award from Westinghouse in July 2008. We will not discuss this award in detail, because it cannot retroactively demonstrate that the petitioner already qualified for the waiver a year earlier, before Westinghouse hired him. An application or petition shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the application or petition was filed. 8 C.F.R. § 103.2(b)(12). *See also Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998) (A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements).

We will note, however, that honors of this type fall under 8 C.F.R. § 204.5(k)(3)(ii)(F). Such recognition constitutes part of a successful claim of exceptional ability, but cannot by itself establish exceptional ability. Therefore, it is self-evident that partial evidence of exceptional ability cannot

persuasively establish eligibility for the national interest waiver, which is an additional benefit over and above a finding of exceptional ability.

The director denied the petition on April 22, 2009, stating: "The contributions of the petitioner/ beneficiary are speculative. There is no evidence that the petitioner/beneficiary's research has been incorporated in current nuclear plant design." The director found that the petitioner's published citation rate did not support a finding in the petitioner's favor.

On appeal, counsel argues that the petitioner "has made impressive contributions to human factors engineering/cognitive ergonomics research." Counsel then lists the petitioner's past research projects, and observes that the petitioner's 2005 article "has been cited as many as **17 times** by other scientists from all over the world." The record contains no persuasive evidence to show that the petitioner's 2005 research into how cellular phone use affects driver safety has any direct, straightforward connection to the design of nuclear power plants. For that matter, the record does not show that the petitioner originated the now commonplace idea that it can be dangerous to use a cellular phone while driving.

The petitioner submits updated information regarding citation of his work. Counsel states:

> [T]he number of non-self citations of his first authored papers was **two (2)** when he submitted his original NIW petition, it increased to **eighteen (18)** at the time of filing his response to [the] RFE, and it continued to increase to **twenty-six (26)** at the time of filing this appeal, **demonstrating a consistent pattern of recognition and influence of his research on the research community**.

(Counsel's emphasis.) Counsel thus acknowledges that the petitioner had a negligible citation record at the time he filed the petition. Counsel does not explain why a later "pattern" retroactively establishes eligibility, in direct conflict with USCIS regulations and case law. We further note that the 26 citations documented on appeal all relate to articles published between 2002 and 2006. None of the cited articles pertain to nuclear power plant design. This citation record, therefore, clearly cannot serve as evidence of the petitioner's influence in the field of nuclear power plant design. At best, these citations establish the petitioner's influence in areas of research that he no longer pursues, and therefore they are of negligible importance in this proceeding. As such, the petition appears to have been filed prematurely, at a time when the petitioner intended to pursue a career in the design of nuclear power plant control rooms but before he had amassed significant achievements in that area.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.